Contract Modifications/Amendments, Change Orders, Extensions and Options

Audit, Business, Technology Committee
January 27, 2005

Contract Modifications/Amendments, Changes Orders, Extensions and Options

The procurement mission is to provide an overall management framework for and support to the District and the District's procurement and supply chain system to ensure that it effectively and efficiently serves the schools and offices in accomplishing their mission.

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"Contract" means a mutually binding legal relationship obligating the seller [vendor] to furnish the supplies and services (including construction and the District to pay for them). It includes all types of commitments that obligate the District to an expenditure of allocated funds and that, except as otherwise authorized, are in writing.

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In addition to bilateral instruments, contracts include, but are not limited to:

- Awards;
- Notices of awards;
- Work Orders; Task Orders or Job Orders issued under basic ordering agreements [bench contracts];
- Letter contracts;
- Orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and
- Bilateral contract modifications.

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The “changes” concept—the concept that a governmental entity should have the right to order/approve changes to the contract work on payment of additional compensation to the contractor—has been a part of the government/public contracting process for many, many years.

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Contract “changes” can occur for a variety of reasons:

- unclear/not well defined Scopes of Work (SOWs)/specifications;
- District underestimates/overestimates its needs;
- differing site conditions;
- Board of Education requires a change;

etc,.

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<u>GENERAL RULE</u>: CHANGES ARE LIMITED TO "WITHIN THE GENERAL SCOPE OF THE CONTRACT." IF CHANGES, AMENDMENTS, OPTIONS ARE OUTSIDE THE ORIGINAL SCOPE OF THE CONTRACT, THE EFFORT SHOULD BE COMPETED UNLESS THERE IS AN URGENT AND COMPELLING REASON TO ADD THE EFFORT TO THE EXISITNG CONTRACT.

- Changes "within the scope" of the contract were defined by a Supreme Court decision and this definition stands today:

"Work within the general scope of the contract is that work that should be regarded as fairly and reasonably within the contemplation of the parties when the contract was entered into."*

- Best practice procurement requires that if the change is outside the general scope of the contract, it should then be competed.

*(Freund vs. United States, 260 U.S. 60 (1922)

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<u>Types of Contract Modifications/Amendments</u>:

- ***Bilateral.*** A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the Procurement Official (PSG or FSD staff with delegated authority). Bilateral modifications are used to:

  (1) Make negotiated equitable adjustments resulting from the issuance of a change order;

  (2) Definitize letter contracts;

  (3) Reflect other agreements of the parties modifying the terms of contracts.

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<u>Types of Contract Modifications/Amendments (continued)</u>:

Unilateral. A unilateral modification is a contract modification that is signed only by the District Procurement Official with delegated authority. Unilateral modifications are used, for example to—

(1) Make administrative changes;

(2) Issue change orders;

(3) Make changes authorized by clauses other than a changes clause (e.g., Options clause, Suspension of Work clause, etc.);

(4) Issue termination notices.

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“Administrative change” means a unilateral change, in writing, that does not affect substantive rights of the parties.

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- **"Contract modification/amendment"** means any written change in the terms of a contract.

- **"Contract option"** means a unilateral right in the contract by which, for a specified time, the District may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

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POLICY REGARDING AMENDMENTS TO CONTRACTS FOR PROFESSIONAL SERVICES—THE “75% RULE” AND DEAD (EXPIRED) CONTRACTS

- Contract can be amended to:
  - extend the period of performance;
  - increase the fee to obtain additional services;
  - allow for a minor change in the current contract scope of work; or
  - any combination of the above.

- Contract cannot be amended, without Board direction/approval, if:
  - there is a significant change in the contract scope of services;
  - the contract value increases to greater than75% of the original contract price; or
  - the contract term/period of performance has expired.

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- **“Change order”** means a written order, signed by the District Procurement Official, directing the contractor to make a change that the contract authorizes the procurement Official to make without the contractor’s consent.

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- A change order that involves rehabilitation, reconstruction of buildings, or other new structures cannot exceed 25% of the original contract price, without securing new bids, when such a change or alteration is a necessary and integral part of the work under the contract. Changes exceeding 15% of the original contract price must be approved by an affirmative vote of not less than 75% of the members of the Board of Education.

(PCC § 20118.4)

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When a contractor considers that the District has effected or may effect a change in the Contract that has not been identified as such in writing and signed by the designated Procurement Official, the Contractor **must** notify the District in writing as soon as possible. This will permit the District to evaluate the alleged change, and:

- Confirm that it is a change, direct the mode of further performance, and plan for its funding;
- Countermand the alleged change; or
- Notify the contractor that no change is considered to have occurred.

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Options

- The “normal” option is established to acquire additional quantities, which is added to a basic quantity of goods or services, but at the price established in the initial contract.
- An option must be contained within the original contract for it to be a valid option, and it must be a part of the initial offer from the contractor.

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- If the District can fulfill its needs by exercise of an option, significant savings in time and administrative costs can be realized.

- Options should only be exercised after determining that:

  - Funds are available;

  - The requirement covered by the option fulfills an existing District need; and

  - The exercise of the option is the most advantageous method of fulfilling the District's need, price and other factors considered, which means:

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1. A new solicitation (RFP/IFB) would fail to produce a better price or a more advantageous offer than that offered by the option;

2. An informal market analysis indicates that the option price is better than that available in the market; and/or

3. The time between the award of a contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer.

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Types of options that may utilized in a contract:

- <u>Option for Increased Quantity</u>

  The District may increase the quantity of supplies, equipment, and material up to 10% of the original contract price at the unit price specified in the contract.

  (PCC § 20118.4)

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- **Option for Increased Quantity- Separately Priced Line Item**

✓ The District may require the delivery of the numbered line item, identified in the Contract as an option item, in the quantity and at the price stated in the Contract.

✓ If the Board of Education has approved the contract inclusive of the options(s)), the District's Procurement Official **may** exercise the option by written notice to the Contractor, within the time period specified in the Contract, at the same price unless the parties otherwise agree.

✓ If the Board of Education contract approval did not contain the provision for the exercise of the option(s), then the Procurement Official shall present the option to the Board for approval in advance of the time period specified in the contract for the exercise of the option(s), at the same price unless the parties otherwise agree.

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- **<u>Option to Extend Services</u>**

✓ The District may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to the labor rates. The option provision may be exercised more than once if it is allowable under the terms of the contract. In no event shall an option extend the contract period beyond what is allowable by law.

✓ If the Board of Education contract approval did not contain the provision for the exercise of the option(s), then the Procurement Official shall present the option to the Board for approval in advance of the time period specified in the contract for the exercise of the option(s), at the same price unless the parties otherwise agree.

Aggregate Policy

"Any contract or amendment which increases the aggregate amount payable to a particular vendor to over $500,000 for the current fiscal year requires advance Board approval, unless the contractor is a government or non-profit agency. In no event shall the contractor perform services until the contract or amendment has been approved by the Board of Education or via Contract Administration's delegated authority."